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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Respondent, v. BYRON ISAIAH McCLOUD, Petitioner and Appellant.	A153615 (Solano County Super. Ct. No. C31353)

A "sexually violent predator" is "a person who has been convicted of a sexually violent offense against one or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (Welf. & Inst.,[1] § 6600, subd. (a)(1).)

"A person who has been committed as a sexually violent predator shall be permitted to petition the court for conditional release." (§ 6608, subd. (a).) "The court shall hold a hearing to determine whether the person committed would be a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior due to his or her diagnosed mental disorder if under supervision and treatment in the community. . . . If the court at the hearing determines that the committed person would not be a danger to others due to his or her diagnosed mental disorder while under supervision and treatment in the community, the court shall order

[1] Statutory references are to this code unless otherwise indicated.

the committed person placed with an appropriate forensic conditional release program . . . ." (*Id.*, subd. (g).) "In a hearing authorized by this section, the committed person shall have the burden of proof by a preponderance of the evidence . . . ." (*Id.*, subd. (k).)

Byron Isaiah McCloud was adjudicated a sexually violent predator (SVP) in 2011, a decision we affirmed. (*People v. McCloud* (2013) 213 Cal.App.4th 1076.)

Four years later, in the annual report required by section 6604.9, the Department of State Hospitals (Department) opposed releasing McCloud. In response, McCloud filed a "Petition for Conditional or Unconditional Release under Welfare and Institutions Code Section 6608 (a)." The prosecuting attorney responded that McCloud was "not authorized for unconditional discharge," and his "request for conditional release is totally and completely without merit." Indeed, the attorney argued, the request was so utterly without merit that it qualified as frivolous, meaning that McCloud's petition could be summarily denied without a hearing. (§ 6608 subds. (a), (b)(1).)

The trial court did not agree the petition was frivolous; ordered the Department to appoint an independent evaluator to examine McCloud; and scheduled an evidentiary hearing on the petition. McCloud subsequently amended his petition to seek only conditional release. The issue was tried to the court (§ 6603 subd. (e)), which found that McCloud "failed to prove that he's no longer a sexually violent predator or that he's suitable for conditional release," and denied the petition.

On this timely appeal, McCloud contends: (1) " The Trial Court's Ruling was Based Upon Inadmissible Case-Specific Hearsay," prohibited by *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*), thus "Constituting a Miscarriage of Justice" , and (2) "Appellant Proved by a Preponderance of the Evidence That He was Not Likely to Engage in Sexually Violent Criminal Behavior if Conditionally Released; the Trial Court Erred in Denying the Petition." We reject both contentions. Doing so, we shall first address the second contention, after making some preliminary observations.

This is McCloud's third appeal. On his first, we affirmed the jury's determination that he was a sexually violent predator, but we reversed in part so that he could present a Constitutional claim against the Sexually Violent Predator Act (SVPA). (*People v.*

McCloud, supra, 213 Cal.App.4th 1076.) On his second appeal, we affirmed the trial court's determination that McCloud's constitutional claim was without merit. (*People v. McCloud* (Jan. 19, 2018, A146973) [nonpub. opn.].) At all times, the responsible judicial officer was the Honorable E. Bradley Nelson, Judge of the Solano County Superior Court.

Moreover, despite its caption, this was not a criminal proceeding, nor even a commitment proceeding, where the prosecuting attorney would have to prove beyond a reasonable doubt that defendant was a sexually violent predator, a type of proceeding where the defendant enjoys many of the protections of a full-blown criminal trial. (§§ 6603, subds. (a), (f), 6604, subd. (a).) This was a civil proceeding. (E.g., *People v. Allen* (2008) 44 Cal.4th 843, 860; *People v. Hurtado* (2002) 28 Cal.4th 1179, 1192.)

Moreover, the civil proceeding was initiated not by the prosecuting attorney, but by McCloud. He was the petitioning party, and thus he had the burden of proof (Evid. Code, § 500), that being the preponderance burden (§ 6608, subd. (k)) of civil proceedings. That burden did not extend to whether he was or was not a sexually violent predator, for that issue was res judicata from the first appeal. Included within that issue—and likewise conclusively established for this proceeding—is that McCloud had a diagnosed mental disorder. For purposes of this appeal, McCloud does not dispute this.[2] McCloud's burden was to disprove the Department's latest conclusion that "At this time, neither conditional nor unconditional release is appropriate. The best interest of Mr. McCloud and the adequate protection [of] the community cannot be assured in a less restrictive treatment setting at this time."

Because Judge Nelson concluded that McCloud had failed to carry his burden, McCloud cannot simply reargue the evidence, believing that he produced sufficient evidence to satisfy it. The task he faces here is far more difficult. " 'In the case where

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[2] However, each of McCloud's experts testified that, in his opinion, McCloud did not have a mental disorder at all, and certainly not one that "predisposes him to sexually violent criminal activity." According to one of those experts, McCloud maintains that his crimes had no sexual intent and he has no mental disorder.

the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) "uncontradicted and unimpeached" and (2) "of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding." ' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 465–466.) Expressed more tersely, "when an appellant challenges a trial court's conclusion that the appellant failed to carry its burden of proof at trial, 'the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law.' " (*Vieira Enterprises, Inc. v. McCoy* (2017) 8 Cal.App.5th 1057, 1074.)

Two witnesses testified for McCloud, Alan Abrams, M.D., and psychologist Christopher Fisher. The prosecuting attorney called psychologists Jay Malhotra and Jeffrey Davis. The testimony of Abrams and Fisher was certainly not " ' "uncontradicted and unimpeached" ' " (*Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc*., *supra,* 196 Cal.App.4th 456, 466), given that Malhotra and Davis drew exactly the opposite conclusion on whether McCloud had a mental disorder and whether he could be released without peril to public safety. When the testimony of Malhotra and Davis are considered, together with Abrams and Fisher, the most fleeting glance at the respondent's brief demonstrates that McCloud cannot maintain " 'the evidence compels a finding in [his] favor as a matter of law.' " (*Vieira Enterprises, Inc. v. McCoy*, *supra*, 8 Cal.App.5th 1057, 1074.) Indeed, McCloud makes no attempt to argue that the evidence was so completely one-sided that no rational trier of fact could have decided against him.

Our opinion could end here. If McCloud failed to satisfy his burden of proof, Judge Nelson was not required to consider or credit the testimony of the psychologists opposing his release.

This court recently summarized *Sanchez* and its impact, there in the interest of hearsay testimony:

"In *Sanchez*, . . . the Supreme Court . . . created a new paradigm for the presentation of gang expert testimony. (*Sanchez*, *supra*, 63 Cal.4th at p. 679.) Before *Sanchez*, an expert was given the latitude to testify both about general background information and about case-specific out-of-court statements in order to explain the basis for his or her expert opinion, and the court typically would instruct the jury to consider the information for that purpose only, and not for its truth. (*Id.* at pp. 679, 683, citing *People v. Gardeley* [(1996)] 14 Cal.4th 605.) In *Sanchez*, the court eliminated this latitude with respect to case-specific facts, which it defined as facts 'relating to the particular events and participants alleged to have been involved in the case being tried.' (*Sanchez*, *supra*, 63 Cal.4th . at p. 676.) It reasoned that when no other competent evidence of those facts is offered, 'there is no denying' that the hearsay statements relayed by the expert are being offered for their truth. (*Id*. at p. 684.) Indeed, the jury in *Sanchez* had been instructed that, in assessing the believability of the expert, it ' "must decide whether information on which the expert relied was true and accurate." ' (*Ibid.*; see CALCRIM No. 332.) While the jury had also been instructed that the hearsay statements on which the expert relied should not be considered ' "proof that the information contained in those statements was true," ' that instruction was in conflict with the first one and could not logically have been applied. '[The jury] cannot decide whether the information relied on by the expert "was true and accurate" without considering whether the specific evidence identified by the instruction, and upon which the expert based his opinion, was also true.' (*Sanchez*, supra, 63 Cal.4th at p. 684.) The state law evidentiary rule established in *Sanchez*, simply stated, is that out-of-court statements about case-specific facts may not be relayed by an expert witness unless they fall within an exception to the hearsay rule. Absent an exception, the case-specific facts

must be established by competent (non-hearsay) evidence presented by other witnesses and the expert's opinion may be based on a hypothetical question that assumes those facts. (*Ibid*.)

"In *Sanchez*, the court also addressed the Sixth Amendment's confrontation clause, as interpreted by the United States Supreme Court in *Crawford* [*v. Washington* (2004) 541 U.S. 36, (Crawford)] and its progeny. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685–686.) Admission through an expert of hearsay statements concerning case-specific facts, the court opined, not only would violate the Evidence Code but, if the hearsay statements were testimonial and *Crawford* 's exceptions did not apply, would also violate the Sixth Amendment. (*Sanchez*, at p. 685.) A 'testimonial' statement is one made when the circumstances objectively indicate there is no ongoing emergency, and the 'primary purpose' of the interrogation or other conversation ' "is to establish or prove past events potentially relevant to later criminal prosecution." ' (*Ohio v. Clark* (2015) 576 U.S. __ [135 S.Ct. 2173, 2179–2180.] . . .)[3]

"The *Sanchez* court established a two-step analysis for determining the admissibility of out-of-court statements. 'The first step is a traditional hearsay inquiry: Is the statement one made out of court; is it offered to prove the truth of the facts it asserts; and does it fall under a hearsay exception? If a hearsay statement is being offered by the prosecution in a criminal case, and the *Crawford* limitations of unavailability, as

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[3] *Ohio v. Clark* was the latest of a number of United States Supreme Court decisions that were surveyed in *Sanchez*. (See *Sanchez*, *supra*, 63 Cal.4th 665, 693–694.) The *Sanchez* court concluded that what emerged from this survey was adoption of the "distinguishing principle of primary purpose. Testimonial statements are those made primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id*. at p. 689.) At a later point in the *Sanchez* opinion, our Supreme Court restated this point: "When the People offer statements about a completed crime, made to an investigating officer by a nontestifying witness, *Crawford* teaches those hearsay statements are generally testimonial unless they are made in the context of an ongoing emergency . . . or for some primary purpose other than preserving facts for use at trial." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.)

well as cross-examination or forfeiture, are not satisfied, a second analytical step is required. Admission of such a statement violates the right to confrontation if the statement is *testimonial hearsay*, as the high court defines that term.' (*Sanchez*, *supra*, 63 Cal.4th at p. 680.)

"The *Sanchez* court's hearsay analysis focused on an expert's testimony about the truth of case-specific facts, and not on the expert's reliance on these facts to form his or her expert opinion. The court emphasized that an expert 'may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so.' (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) 'What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.' (*Id.* at p. 686.) The court also affirmed the long-standing rule that expert witnesses have greater latitude than lay witnesses to testify about 'generally accepted background information' (*id.* at p. 676), even when that information is based on hearsay: 'In addition to matters within their own personal knowledge, experts may relate information acquired through their training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc.' (*Id*. at p. 675.) 'An expert may . . . testify about more generalized information to help jurors understand the significance of . . . case-specific facts.' (*Id*. at p. 676.)" (*People v. Anthony* (2019) 32 Cal.App.5th 1102, 1129–1131, fn. omitted)

There are several features of *Sanchez* that do not directly transfer to this appeal.

First, because this is a civil proceeding, a central feature of *Sanchez*—the Sixth Amendment prohibition on testimonial hearsay from *Crawford*, *supra*, 541 U.S. 36—is absent, namely, the constitutional right of *a criminal defendant* to confront witnesses. (*People v. Dalton* (2019) 7 Cal.5th 166, 232; *People v. Allen*, *supra*, 44 Cal.4th 843, 860; *Sanchez*, *supra*, 63 Cal.4th 665, 681 [text & fn.6].)

Second, because "the Fifth Amendment's guarantee against compulsory self-incrimination does not apply to proceedings under the SVPA" (*People v. Allen*, *supra*, 44 Cal.4th 843, 860), anything McCloud said to a therapist-witness (i.e., Abram, Malhotra

and Fisher) amounts to a party admission (Evid. Code, § 1220), and thus does not qualify as hearsay for purposes of *Sanchez*. (See, e.g., *People v. Flint* (2018) 22 Cal.App.5th 983, 998, 1000; *People v. Landau* (2016) 246 Cal.App.4th 850, 866–867.)

Third, because these federal constitutional rights are not implicated in this civil proceeding, any error is assessed under the state standard of *People v. Watson* (1956) 46 Cal.2d 818. (See, e.g., *People v. Flint*, *supra*, 22 Cal.App.5th 983, 1003-1004; *People v. Jeffrey G*. (2017) 13 Cal.App.5th 501, 510.)

Finally, the trier of fact in this civil proceeding was not a lay jury, but an experienced jurist. This is central: "As an aspect of the presumption that judicial duty is properly performed [Evid. Code, § 664], we presume . . . that the court knows and applies the correct statutory and case law [citation] and is able to distinguish admissible from inadmissible evidence, relevant from irrelevant facts, and to recognize those facts which properly may be considered in the judicial decision making process." (*People v. Coddington* (2000) 23 Cal.4th 529, 644.) Stated another way, a trial court is presumed to ignore material it knows is incompetent, irrelevant, or inadmissible. (E.g., *Harris v. Rivera* (1981) 454 U.S. 339, 346; *People v. Charles* (1967) 66 Cal.2d 330, 338, fn. 12.) If the court states it will ignore evidence, it will be presumed that the court did so. (*People v. Powell* (1949) 34 Cal.2d 196, 204–205; *Jones v. Morse* (1868) 36 Cal. 205, 207.) "Our procedural system entrusts to professional judges a great deal of information which a jury is not permitted to know about, e.g., prior convictions, inadmissible confessions and hearsay received only for probable cause to arrest. Appellate courts ordinarily presume that a judge is capable of weighing the admissible evidence without being prejudiced by extraneous matters." (*Solomon v. Superior Court* (1981) 122 Cal.App.3d 532, 537.)

These presumptions are based on the difference between lay jurors and judges: " 'The juror does not possess that trained and disciplined mind which enables him . . . to discriminate between that which he is permitted to consider and that which he is not. Because of this lack of training, he is unable to draw conclusions entirely uninfluenced by the irrelevant prejudicial matters within his knowledge.' " (*People v. Albertson*

(1944) 23 Cal.2d 550, 577; accord, *People v. Williams* (1970) 11 Cal.App.3d 970, 977–978; *People v. Adamson* (1964) 225 Cal.App.2d 74, 77.) Only proof that the evidence actually figured in the court's decision will overcome these presumptions. (*White v. White* (1890) 82 Cal. 427, 452; *Claremont Press Pub. Co. v. Barksdale* (1960) 187 Cal.App.2d 813, 818.) Clearly, the mere fact that the court heard or read inadmissible matter is not sufficient to overcome the presumptions. (See, e.g., *People v. Tang* (1997) 54 Cal.App.4th 669, 677–678, 683; *People v. Bustamante* (1992) 7 Cal.App.4th 722, 726–727.)

This is how, in his brief, McCloud identifies the expert testimony he challenges on this appeal (the bracketed numbers are added for ease of subsequent reference):

"The prosecution's experts testified to the following case-specific facts:

"[1] That appellant had 29 rule violations while in prison, [2] 'and it included nine for possession and/or manufacture of alcohol, one for battery on an inmate in 1993.' (6 RT 489.)

"[3] That appellant told one of the victims to 'get on her knees and made a threat to blow her head off if she didn't comply, that he herded -- and that was in quote in the report --the victim around the house and asked if she lived alone.' (6 RT 492-493.)

"[4] That appellant told one victim, 'All you old ladies have such nice soft asses.' (6 RT 492-493, 514.)

"[5] That in three of the incidents, appellant bound the victims and with one victim, appellant tied her up a second time with a rope and a belt. (6 RT 509.)

"[6] That in the 1991 offense, appellant went to the door and asked for a person. (6 RT 511.)

"[7] That appellant 'offended against a girl when her parents were in the home or some caregiver was in the home.' (6 RT 530.)

"[8] That in the 1991 incident, appellant 'returned to the house, knowing that the victim was in there.' (6 RT 531.)

"[9] That appellant took nothing during the June 6th, 1979, offense. (4 RT 219.)

"[10] That appellant waited in a home for one of the victims. (4 RT 253-254.)

"[11] That appellant exposed himself to another patient in the hospital. (6 RT 533.)"

The Attorney General claims that no hearsay objection was made to statements 9 and 10, thereby putting them beyond review.[4] (Evid. Code § 353, subd. (a).) This is correct. The pages cited by defendant establish that the only objections made to statement 9 were "lacks foundation" and "nonresponsive." As for statement 10, defendant's objection was "lacks foundation and assumes facts not in evidence as to when he entered the home, how long he had been in the home, when the victim arrived home." Thus, the correctness of statements 9 and 10 were not preserved for review. (E.g., *People v. Abel* (2012) 53 Cal.4th 891, 924; *People v. Kennedy* (2005) 36 Cal.4th 595, 612.)

With these two exceptions, McCloud did make hearsay objections *which were sustained*. However, Judge Nelson admitted each of the witness answers for the non-

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[4] The Attorney General believes there is a 12th statement defendant challenges, but the only reference to it in McCloud's opening brief does not specifically identify it as one of the statements he is contesting. The objection to this testimony was "lack of foundation." Judge Nelson, displaying an obvious knowledge of *Sanchez*, responded: "So just rephrase your question, Ms. Moore. I mean, there is some—you know, we have some rules against the use of hearsay evidence. I don't think the People have been trying to elicit these facts as hearsay, there at least has been no objection in that regard. There are some exceptions in these SVP cases, I'm not sure it still exists, but I know probation reports were allowed to be relied on during the underlying trial. [¶] I guess what I'm getting at by saying that is: To the extent you're asking this witness what he relied upon in terms of reports of others, you can question him about that and ask him if he relied upon the reported ages . . . . What the actual ages of these individuals were, I'm not sure we know that." The prosecuting attorney then asked Dr. Abrams "Based on your review of the reports, it appears that the victims in the sexually violent crimes committed by Mr. McCloud were from age 10 to 71?" The doctor's response was "Yes, that's what I read." There was no defense objection to this. Moreover, psychologist Malhotra testified—without objection by McCloud —that some of the victim's ages were 10, 18, 37, 57, and 71. Also, other witnesses mentioned that one victim's age was ten while another's was 71.

The Attorney General further tells us a 14th statement, in a Department of Justice report, describing McCloud as "polite," is closed to review because it was elicited by McCloud. In point of fact, it was twice elicited from one of his own witnesses.

hearsay purpose of explaining the expert's opinion. Such is permitted by *Sanchez*. (See *Sanchez*, 63 Cal.4th 665, 681 ["If statements related by experts as basis for their opinions are not admitted for their truth, they are not hearsay. Neither the hearsay doctrine nor the confrontation clause is implicated when an out-of-court statement is not received to prove the truth of a fact it asserts".)

And when, in stating his ruling, Judge Nelson stated, "have not relied on any inadmissible case specific hearsay that was objected to," he plainly evidenced a knowledge of *Sanchez*, and what it prohibited and what it allowed. That statement will be taken at face value unless McCloud proves otherwise. (*People v. Coddington*, *supra*, 23 Cal.4th 529, 644; *People v. Powell*, *supra*, 34 Cal.2d 196, 204–205; *People v. Tang*, *supra*, 54 Cal.App.4th 669, 677–678, 683.) Which he does not.

Moreover, the Attorney General, demonstrating a through familiarity with the record, makes a persuasive case that virtually all of the statements McCloud identifies as case-specific hearsay, were given in other form without generating an objection. This was confirmed with our review of the record.

Take, for example, the first and second of the challenged statements. Psychologist Fisher, a witness for McCloud, was asked *on direct examination* "did you determine how many rule violations you observed during that period between 1980 and 2000, during the 20-year period?" He answered "I think it's about 29 or 30." Later, when asked on cross-examination "Do you recall what some of those rule violations consisted of?", there was no objection when Fisher replied "I think the majority were for production of Pruno."[5] Fisher had already testified on direct that McCloud had "manufactured Pruno" while incarcerated in state prison. And this was after psychologist Malhotra had testified,

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[5] Fisher later testified that McCloud "always admitted to me that he made Pruno in prison."

There was also testimony about McCloud's conduct at the state hospital. Although it was not specifically identified as a "rule violation," the issue of McCloud being accused by another patient as exposing himself—the subject of challenged statement 12—was addressed, without objection from McCloud, by multiple witness. It was undisputed that McCloud had 13 rule violations while a patient at Coalinga State Hospital, the last occurring in 2016.

without objection, that he (Malhotra) had reviewed "information regarding Mr. McCloud's rule violations while in [the] CDC," and there were "quite a few" violations, and the ones for possessing Pruno "were numerous and he [McCloud] was quite open about it" when Malhotra interviewed him. Most significantly, while McCloud objected to Dr. Davis on page 489 of the reporter's transcript, he did not object when Dr. Davis on page 487 testified that the records showed that McCloud had 29 rule violations while in prison. And on page 557, counsel for McCloud confirmed from Davis that "over that 20-year period, between 1980 and 2000, he [McCloud] received 29 violations" and that "[n]ine of those were for possession or manufacture of alcohol."

The same is true for other statements. Thus, if there was any *Sanchez* error, it would not qualify as prejudicial because we could still sustain the order on the ground that, wholly without regard to any defects in his opponent's proof, it was McCloud who had failed to satisfy *his* burden of proof. As we now demonstrate, that exercise is easily and quickly accomplished.

One of McCloud's own experts, Dr. Abrams, testified that McCloud was not currently participating in the sex offender treatment program at Coalinga State Hospital because he (McCloud) said previous participation in the program "was being used against him, and . . . he indicated he felt he didn't see that it would ever lead to his release." A state hospital will not consider conditional release for a person who doesn't participate in such a program. Psychologist Malhotra testified that "someone . . . that doesn't like to follow rules"—clearly meaning McCloud —"wouldn't last an afternoon" complying with the "very strict rules" governing conditional release.

It was undisputed that conditional release would require McCloud to be in the conditional release (CONREP) program. Cecelia Groman, a licensed psychologist and the person who interviews patients "assessing their suitability for the conditional release program." During her interview with McCloud, he "said he really didn't have insight into what led him to commit these sex offenses." With McCloud refusing to participate in the sex offender treatment program at the state hospital, his "lack of insight . . . does not bode well for release into the community." So does his lack of a "discharge plan."

Groman concluded that "Mr. McCloud would . . . jeopardize the health and safety of the community if released into the CONREP program." In her opinion, a person is not suitable for conditional release if he refuses to participate in the sex offender treatment program at the state hospital.

Malhotra further testified that McCloud, who does not admit his multiple diagnosed conditions, would, if released, be at high risk of re-offending. According to Malhotra, who has had the longest experience with him, McCloud has "a . . . near severe level of psychopathy."

Two of the most elemental rules of appellate review are that the trier of fact can select which witness is to be believed (Evid. Code, § 312, subd. (b); *People v. Lacefield* (2007) 157 Cal.App.4th 249, 261 ["The jurors were entitled to accept or reject all of the testimony, or a portion of the testimony, by any of the [] witnesses"]), and that a credibility decision is, except in extraordinarily-rare instances, conclusive. (Evid. Code, § 411; *People v. Lindberg* (2008) 45 Cal.4th 1, 27 ["A reviewing court neither reweighs evidence nor reevaluates a witness's credibility"].) So, by obviously rejecting the testimony of Abrams and Fisher, and accepting the testimony of Malhotra and Davis, Judge Nelson had a valid evidentiary basis for concluding that McCloud had not carried his burden of proving that he could be released without posing a danger to others. (§ 6608, subd. (g), (k).) Accordingly, McCloud's contention that it was error to deny his petition is without merit.

The order denying the petition for release is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

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